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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE ALBERTO FLORES DIAZ,

Defendant and Appellant.

H042670

(Monterey County
Super. Ct. Nos. SS120976A,
SS122274A)

I. INTRODUCTION

In case No. SS120976A, defendant Jorge Alberto Flores Diaz pleaded no contest to voluntary manslaughter and admitted that he personally used a deadly weapon in the commission of the offense (Pen. Code, §§ 192, subd. (a), 12022, subd. (b)(1)).¹ In case No. SS122274A, defendant pleaded no contest to dissuading a witness by force or threat (§ 136.1, subd. (c)(1)), assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)), and false imprisonment (§ 236). The trial court sentenced defendant to a total term of 17 years eight months in prison. The court also ordered defendant to pay restitution fines of \$3,600 in the first case and \$4,500 in the second case (§ 1202.4, subd. (b)), along with suspended parole revocation restitution fines (§ 1202.45).

¹ All further statutory references are to the Penal Code unless otherwise indicated.

On appeal, defendant contends that the restitution fines should be reduced from \$3,600 to \$2,880 in the first case, and from \$4,500 to \$3,600 in the second case. Defendant argues that the trial court calculated the fines based on the statutory formula (§ 1202.4, subd. (b)(2)), but in doing so, the court erroneously used the statutory minimum fine applicable at the time of sentencing (\$300), rather than the statutory minimum fine applicable at the time of his crimes (\$240). Defendant contends that the restitution fines thus violate his rights under the ex post facto clauses of the federal and state Constitutions, and that his trial counsel was constitutionally ineffective for failing to object to the fines at the time they were imposed. He also argues that the parole revocation restitution fines should be reduced accordingly.

For reasons that we will explain, we will reduce the restitution fines and corresponding parole revocation restitution fines in both cases, and affirm the judgments as so modified.

II. BACKGROUND

The facts underlying defendant's offenses are not relevant to the claim raised on appeal. The pertinent procedural history follows.

A. The Charges

In June 2012, in case No. SS120976A, defendant was charged by information with murder with personal use of a deadly and dangerous weapon, a knife. (§§ 187, subd. (a), 12022, subd. (b)). The male victim was allegedly killed on or about May 11 through May 12, 2012.

In January 2013, in case No. SS122274A, defendant was charged by information with kidnapping (§ 207, subd. (a); count 1), making criminal threats (§ 422, subd. (a); count 2), assault with a deadly weapon (§ 245, subd. (a)(1); count 3), dissuading a witness by force or threat (§ 136.1, subd. (c)(1); count 4), and forcible rape (§ 261, subd. (a)(2); count 5). The information further alleged that defendant personally used a deadly and dangerous weapon, a knife, during the commission of the offenses, and that

he personally inflicted great bodily injury (§§ 12022, subd. (b)(1), 12022.7, subd. (a)). The offenses allegedly occurred on or about May 11 through May 12, 2012, against a female victim.

The record reflects that in April 2013, the prosecution's motion to consolidate the two cases was granted but "held in abeyance until [the] day of trial."

B. The Pleas

In June 2015, the information in the first case (No. SS120976A) was amended to add a count for voluntary manslaughter with personal use of a deadly weapon, a knife (§§ 192, subd. (a), 12022, subd. (b)(1)). Defendant pleaded no contest to this count and admitted the enhancement with the understanding that he would receive 12 years. The remaining count was submitted for dismissal at the time of sentencing.

In the second case (No. SS122274A), the information was amended to add two counts: assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)) and false imprisonment (§ 236). Defendant pleaded no contest to these two counts and to dissuading a witness by force or threat (§ 136.1, subd. (c)(1)), with the understanding that he would receive five years eight months. The remaining counts were submitted for dismissal at the time of sentencing.

C. The Probation Officer's Memorandum

Defendant waived a presentence investigation report and the matter was referred to the probation department for a "credits-only" report. The probation officer's memorandum contained credit calculations and recommendations regarding restitution fines and other amounts. Regarding restitution fines, in the first case (No. SS120976A), the probation officer recommended that defendant "be required to pay a restitution fine of [\$300] times the number of years (12), times the number of felony counts (1) for a total restitution fine of \$3,600 (PC §1202.4(b)(2))." In the second case (No. SS122274A), the probation officer recommended that defendant "be required to pay a restitution fine of

[\$300] times the number of years (5), times the number of felony counts (3) for a total restitution fine of \$4,500 (PC §1202.4(b)(2)).”

D. The Sentencing Hearing

The sentencing hearing was held on June 10, 2015. The trial court stated that it had “reviewed the credits and fines” memorandum from the probation officer. The parties indicated that they did not have any additions or corrections to the memorandum.

In the first case (No. SS120976A), the trial court sentenced defendant to 12 years in prison and ordered him to pay a “\$3,600 restitution fine.” In the second case (No. SS122274A), the court sentenced defendant to five years eight months in prison and ordered him to pay “a restitution fine of \$4,500.” In each case defendant was also ordered to pay a suspended parole revocation restitution fine in an amount equal to the restitution fine (§ 1202.45). The minutes for each case, which the trial court signed, indicate that defendant was ordered to pay restitution fines pursuant to “PC 1202.4(b).” The remaining counts and allegations in both cases were dismissed or stricken.

III. DISCUSSION

A. The Parties’ Contentions

Defendant contends that the trial court intended to calculate his restitution fines by using the formula set forth in section 1202.4, subdivision (b)(2), which is based in part on the statutory minimum restitution fine. Defendant argues that the statutory minimum restitution fine at the time of his offense was \$240, and therefore the court’s use of \$300 as the minimum fine in the formula violated the ex post facto clauses of the federal and state Constitutions. Defendant further contends that his trial counsel rendered ineffective assistance by failing to object to the fines at the sentencing hearing, and that the fines should be reduced to \$2,880 and \$3,600, with corresponding reductions in the parole revocation restitution fines.

The Attorney General contends that the amounts of the restitution fines imposed by the trial court were statutorily authorized, and that defendant fails to establish

ineffective assistance of counsel. The Attorney General argues that the trial court never indicated it was relying on the formula in section 1202.4, subdivision (b)(2) to calculate the restitution fines.

In reply, defendant contends that the probation officer expressly relied on the statutory formula and the wrong minimum restitution fine, that the trial court and the parties “were well aware that the restitution fines were based on section 1202.4, subdivision (b)(2),” and that it was “obvious” that the court “reviewed,” “agreed,” and “followed” the probation officer’s recommendation.

B. Analysis

When defendant committed his offenses in 2012, section 1202.4, subdivision (b)(1) provided that the amount of a felony restitution fine “shall be set at the discretion of the court and commensurate with the seriousness of the offense, but *shall not be less than two hundred forty dollars (\$240) starting on January 1, 2012, two hundred eighty dollars (\$280) starting on January 1, 2013, and three hundred dollars (\$300) starting on January 1, 2014, and not more than ten thousand dollars (\$10,000) . . .*” (Stats. 2011, ch. 358, § 1, italics added.) Subdivision (b)(2) of section 1202.4 provides that, “[i]n setting a felony restitution fine, the court may determine the amount of the fine as the product of the *minimum fine pursuant to paragraph (1)* multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.” (Italics added; see also Stats. 2011, ch. 358, § 1.) In cases in which the court imposes a restitution fine and the sentence includes a period of parole, a parole revocation restitution fine must be imposed in the same amount as the restitution fine. (§ 1202.45, subd. (a); see *People v. Smith* (2001) 24 Cal.4th 849, 853 [discussing former section 1202.45].)

“[T]he imposition of restitution fines constitutes punishment, and therefore is subject to the proscriptions of the ex post facto clause . . . [Citations.]” (*People v.*

Souza (2012) 54 Cal.4th 90, 143 (*Souza*).) Consequently, a court may not impose a restitution fine in a minimum amount increased after the defendant's offense. (*People v. Saelee* (1995) 35 Cal.App.4th 27, 30-31; *People v. Martinez* (2014) 226 Cal.App.4th 1169, 1189 (*Martinez*).) However, "the rule of forfeiture is applicable to ex post facto claims [citation], particularly where any error could easily have been corrected if the issue had been raised at the sentencing hearing." (*Martinez, supra*, at p. 1189.)

In this case, defendant contends that he received ineffective assistance of counsel because his trial counsel failed to object to the restitution fines on ex post facto grounds at the time of sentencing. To prevail on an ineffective assistance of counsel claim, defendant must show (1) his trial counsel's deficient performance and (2) prejudice as a result of that performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) Deficient performance is established if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance," under "prevailing professional norms." (*Id.* at p. 690.) Prejudice is established if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.)

In *Martinez*, the probation officer recommended a \$12,320 restitution fine under the formula set forth in section 1202.4, subdivision (b)(2), using the \$280 minimum fine applicable in 2013, even though the defendant's crime had occurred in 2011, when the minimum fine was only \$200. (*Martinez, supra*, 226 Cal.App.4th at pp. 1188, 1189 & fn. 13.) The trial court then imposed the recommended \$12,320 fine, specifying that it was using the statutory formula. (*Id.* at p. 1188.) This court held that there was no conceivable tactical reason for trial counsel not to object to the use of the incorrect minimum statutory fine. (*Id.* at p. 1190.) This court explained, "given the court's commitment to use the statutory formula in Penal Code section 1202.4, subdivision (b)(2), it appears more than likely that the court would have imposed the

restitution fund fine using the \$200 minimum that was in effect when appellant committed his crimes had counsel raised an objection at the sentencing hearing.” (*Ibid.*)

Similarly, in *People v. Le* (2006) 136 Cal.App.4th 925 (*Le*), the trial court ordered the defendant to pay a restitution fine of “ ‘\$4,800 under the formula permitted by [section] 1202.4.’ ” (*Id.* at p. 932.) The record thus “indicate[d] that the trial court relied on the formula provided by section 1202.4, subdivision (b)(2), when the court calculated the amount of the \$4,800 restitution fine.” (*Id.* at p. 935.) This court consequently found it “reasonably probable that the trial court would have imposed a smaller restitution fine” if trial counsel had objected to the improper inclusion of one of defendant’s convictions and its corresponding sentence, which should have been stayed under section 654, in the restitution fine calculation. (*Le, supra*, at p. 935.)

In this case, the probation officer recommended restitution fines of \$3,600 in the first case and \$4,500 in the second case. The recommended fines were based on the formula set forth in section 1202.4, subdivision (b)(2) and the statutory minimum fine at the time of sentencing in 2015 (\$300), rather than the statutory minimum at the time defendant committed his offenses in 2012 (\$240). (Stats. 2011, ch. 358, § 1.)

The trial court imposed restitution fines of \$3,600 in the first case and \$4,500 in the second case, which were the same amounts recommended by the probation officer, without making any reference to the formula provided by section 1202.4, subdivision (b)(2). Although the trial court did not state that it calculated the fines based on the formula provided by section 1202.4, subdivision (b)(2), it appears from the record that the trial court adopted the probation officer’s recommendations concerning the amount of the restitution fines, which were calculated by using the statutory formula and the wrong statutory minimum fine. In particular, the court stated that it had reviewed the probation officer’s memorandum regarding fines. Neither the parties nor the court expressly stated that changes needed to be made to the memorandum. The court subsequently imposed restitution fines, suspended parole revocation restitution fines,

court operations assessments (§ 1465.8, subd. (a)(1)), and court facilities assessments (Gov. Code, § 70373) in the exact same amounts as recommended by the probation officer. The court also ordered, as recommended by the probation officer, that defendant provide the identifying information required by section 296 and that defendant pay restitution in an amount to be determined. Further, the sequence in which the court addressed these subjects (that is, fines, assessments, identifying information, and restitution) for each case during the hearing was in the exact same order as listed in the probation officer's memorandum. Lastly, the court granted defendant custody credits in both cases in the exact same amounts as recommended by the probation officer. In view of the record, where the trial court appears to have adopted all of the probation officer's recommendations, the only reasonable inference is that the court also adopted the probation officer's particular calculation of the restitution fines, which used the statutory formula but the incorrect minimum fine.

The Attorney General contends that there was no ex post facto violation in this case because the amount of defendant's restitution fines "were well within the range of fines statutorily authorized" at the time of his offenses. As we have explained, however, the record reflects that the trial court relied on the statutory formula in determining the amount to impose and, in doing so, the court used a minimum amount that was greater than what applied at the time of defendant's crimes, in violation of ex post facto principles. (*Souza, supra*, 54 Cal.4th at p. 143.) Although the total amount of the restitution fine and whether to use the statutory formula is discretionary, it does not negate the ex post facto violation that occurred when the court did use the formula to calculate the amount.

In sum, the record reflects that the trial court relied on the statutory formula provided by section 1202.4, subdivision (b)(2) in imposing the restitution fines and in the process used an incorrect minimum fine. Trial counsel in this case "failed to object to the trial court's mistaken use of the minimum statutory fine that was in effect at sentencing to

calculate [defendant's] restitution fund fine. We cannot conceive of any tactical reason for counsel's failure to object. On the record before us, given the court's commitment to use the statutory formula in Penal Code section 1202.4, subdivision (b)(2), it appears more than likely that the court would have imposed the restitution fund fine using the [\$240] minimum that was in effect when [defendant] committed his crimes had counsel raised an objection at the sentencing hearing." (*Martinez, supra*, 226 Cal.App.4th at p. 1190; see *Le, supra*, 136 Cal.App.4th at pp. 935-936.)

Accordingly, we determine that trial counsel's error was prejudicial, and we will reduce the amount of the restitution fines and corresponding parole revocation restitution fines. Based on the statutory formula, and as requested by defendant, we will order the restitution fines reduced from \$3,600 to \$2,880 in the first case, and from \$4,500 to \$3,600 in the second case, with the corresponding parole revocation restitution fines similarly reduced.

IV. DISPOSITION

In case No. SS120976A, the judgment is ordered modified by reducing the restitution fine to \$2,880 (Pen. Code, § 1202.4, subd. (b)) and the parole revocation restitution fine to \$2,880 (Pen. Code, § 1202.45, subd. (a)).

In case No. SS122274A, the judgment is ordered modified by reducing the restitution fine to \$3,600 (Pen. Code, § 1202.4, subd. (b)) and the parole revocation restitution fine to \$3,600 (Pen. Code, § 1202.45, subd. (a)).

As so modified, the judgments are affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

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